80-2127

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1049-1144 September Term, 1980

Docket Nos. 80-6254 et al.

Date Filed: June 15, 1981

THE MARSCHALK COMPANY, INC.,

Plaintiff-Appellee,

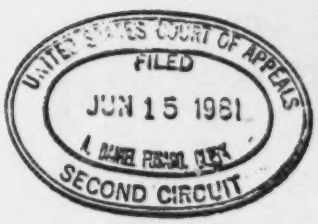
v.

IRAN NATIONAL AIRLINES CORP. and
THE GOVERNMENT OF IRAN,

Defendant-Appellants,

UNITED STATES OF AMERICA,

Intervenor-Appellant.



B e f o r e: TIMBERS, VAN GRAAFEILAND and MESKILL, Circuit Judges.

ORDER CERTIFYING QUESTIONS TO THE SUPREME COURT OF THE UNITED STATES.

The judges of this panel having encountered questions of law upon which instructions are desired, and in the interest of proper administration and expedition of judicial business, see Wisniewski v. United States, 353 U.S. 901, 902 (1957), the following questions are hereby certified to the Supreme Court of the United States pursuant to 28 U.S.C. § 1254(3) (1976) and Supreme Court Rule 24.

Statement of Facts

Iran National Airlines Corp. (IRAN AIR), an instrumentality of the Government of Iran licensed to do business in New York, entered into a contract effective August 15, 1978 with the Marschalk Company, Inc. (MARSCHALK), a New York corporation, for the performance of advertising services in the United States. Under the contract,

Marschalk was to act as Iran Air's advertising agent in the United States for one year from the date of the contract, and thereafter unless proper notice of cancellation was given. In accordance with its contractual duties, Marschalk created and placed advertisements in print media in various markets in the United States, billing Iran Air for the work when the advertisements were published. After a brief period of punctual payments, Iran Air began to fall behind in its payments to Marschalk. By November 30, 1979, Marschalk had invoiced Iran Air for $46,528.02, no part of which had been paid. Iran Air neither contested the invoices nor objected to Marschalk's performance under the contract.

During the same period, relations between the United States and Iran had worsened. In response to the November 4, 1979 seizure of American hostages, President Carter on November 14, 1979 declared a national emergency and issued Executive Order 12,170, which ordered blocked "all property or interests in property" of Iran within the jurisdiction of the United States and which authorized the Secretary of Treasury to implement the freeze order with appropriate regulations. 44 Fed. Reg. 65,729. Pursuant to this authority, the Secretary issued regulations which blocked the removal or transfer of Iranian assets in the United States except according to the terms of licenses accompanying the freeze order or issued thereunder. 31 C.F.R. Part 535. Specifically, the regulations provided, "Unless licensed or authorized pursuant to this part any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property in which on or since the effective date there existed an interest of Iran." 31 C.F.R. § 535.203(e). On November 21, 1979, the Secretary promulgated a regulation stating that "[t]he provisions of this part and any rulings, licenses, authorizations, instructions, orders, or forms issued thereunder may be amended, modified, or revoked at any time." 31 C.F.R. §535.805. On November 26, 1979 the Secretary promulgated a regulation authorizing "judicial proceedings" against Iran with the exception of "the entry of any judgment or of

any decree or order of similar or analogous effect." 31 C.F.R. § 535.504(a); (b)(1). On December 19, 1979, the Secretary promulgated a regulation which explained that "[t]he general authorization for judicial proceedings contained in § 535.504(a) included pre-judgment attachments." 31 C.R.F. § 535.418.

On December 28, 1979, Marschalk filed suit in the United States District Court for the Southern District of New York seeking judgment against Iran Air and Iran in the amount of $46,528.02 plus interest and costs. Three days later, on December 31, 1979, the district court granted, pursuant to N.Y. Civ. Prac. L.R. § 6211(a) (McKinney), an ex parte order of attachment against defendant's assets located in several banks. On September 26, 1980, the district court ruled in 96 consolidated cases that Iran's assets were not immune from pre-judgment attachments. New England Merchants National Bank v. Iran Power Generation and Transmission Co., 502 F.Supp. 120 (S.D.N.Y. 1980). The cases were then returned to the individual district judges for confirmation pursuant to N.Y. Civ. Prac. L.R. § 6211(b).

Before the ex parte attachment in Marschalk could be confirmed, however, President Carter on January 19, 1981 entered into an agreement with Iran to secure the release of the hostages. The initial agreement calls for the establishment of an Iran-United States Claims Tribunal which, with certain exceptions, will arbitrate all unsettled claims and whose awards will be "final and binding" and "enforceable . . . in the courts of any nations in accordance with its laws." Under the terms of the agreement, the United States is obliged to

> "terminate all legal proceedings in the United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration."

To implement the agreement, President Carter issued Executive Orders 12,276 through 12,285, which revoked the licenses

permitting attachments of frozen assets, nullified the attachments required under those licenses, and required those holding frozen assets to turn them over to the Federal Reserve Bank for transfer to Iran. On February 24, 1981 President Reagan ratified the January 19, 1981 Executive Orders and ordered the "suspension" of "[a]ll claims which may be presented to the [Tribunal]", stating that "such claims shall have no legal effect in any action now pending in any court of the United States. . . . ." 46 Fed. Reg. 14,111 (1981).

The district court found that Marschalk's claim would, under the terms of the agreement, fall within the jurisdiction of the Claims Tribunal. The court declined to suspend the litigation of the claim, however, ruling that the agreement and Executive Orders issued in furtherance thereof were not within the Executive's statutory or constitutional authority, and thus were invalid and unenforceable. Having found that Marschalk had demonstrated likelihood of success on the merits, see N.Y. Civ. Prac. L.R. § 6212(a) (McKinney), the district court confirmed the attachment and denied motions to dismiss the suit and vacate the attachments.

Questions Certified

(1) Was the action of the President in suspending claims which may be presented to the Claims Tribunal and in declaring that they shall have no legal effect in the courts of the United States within his statutory and/or constitutional authority?

(2) Was the action of the President in nullifying the attachments acquired on blocked assets and requiring the transfer of those assets to Iran within his statutory and/or constitutional authority?

(3) Did the action of the President in suspending the claims or nullifying the attachments constitute a taking of property for which compensation must be paid?

Wm. H. Timbers.
William H. Timbers

Ellsworth A. Van Graafeiland

Thomas J. Meskill
Thomas J. Meskill

A true copy,
A. Davis Jones Clerk

FORM 1080—Notice of motion: U.S. Court of Appeals: Second Circuit: 1-78

PTD. BY JULIUS BLUMBERG, INC. NYC 10013

Second Circuit Rule 27(a) governing use of this form is reprinted on reverse.
Note requirement that lower court opinion or agency decision be attached.

Consolidated Appeals Docket Nos.

80	6254 et al.

Docket Number

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THE MARSCHALK COMPANY, INC.,
-v- Plaintiff-Appellee,
IRAN NATIONAL AIRLINES CORP. and
THE GOVERNMENT OF IRAN,
Use short title UNITED STATES [and related cases] Defendants-Appellants, Intervenor-Appellant.

NOTICE OF MOTION
state type of motion

for order certifying legal questions to the U.S. Supreme Court

MOTION BY: *(Name and tel. no. of attorney in charge)*

See Appendix A

OPPOSING COUNSEL: *(Name and tel. no. of attorney in charge)*

See Appendix B

Has opposing counsel consented? ☐ Yes ☒ No
Has service been effected? ☒ Yes ☐ No
Is oral argument desired? ☐ Yes ☒ No
(Substantive motions only)
Requested return date:
(See Second Circuit Rule 27(b))
Date of argument of appeal, if scheduled:

Judge or agency whose order is being appealed:

Hon. Kevin T. Duffy

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL
Has request for relief been made below?
(See F.R.A.P. Rule 8.) ☐ Yes ☒ No
Would expedited appeal eliminate need for this motion?
☐ Yes ☒ No
If no, explain why not:

Cases should be heard by Supreme Court with case now pending there.

Brief statement of the relief requested:

Movants request an order, pursuant to 28 U.S.C. § 1254(3), certifying to the Supreme Court the legal questions raised by these consolidated appeals.

Previous requests for similar relief and disposition:

None

Statement of the issue(s) presented by this motion:

Whether movants are entitled to an order, pursuant to 28 U.S.C. § 1254(3), certifying to the Supreme Court the legal questions raised by these consolidated appeals.

Brief statement of the facts *(with page references to the moving papers)*:

This Court has retained jurisdiction over 96 cases raising issues concerning the validity of orders attaching and prohibiting transfer of Iranian assets. Pursuant to this Court's April 9, 1981 opinion the District Court has considered these issues and returned its determination for prompt review. The issues raised in these consolidated appeals are identical to those raised by Dames & Moore v. Regan, in which the United States Supreme Court has granted certiorari and established an expedited briefing schedule with oral argument set for 10:00 a.m., June 24, 1981.

Summary of the argument *(with page references to the moving papers)*:

Since the legal questions in this appeal are identical to those in Dames & Moore v. Regan, this Court should certify those questions, pursuant to 28 U.S.C. § 1254(3), for review and determination by the Supreme Court.

6/12/81
Date

John W. Dickey
The name signed must be printed beneath

ORDER

Kindly leave this space blank.

IT IS HEREBY ORDERED that the motion

be and it hereby is granted denied

Date

Circuit Judge

RULES of the UNITED STATES COURT OF APPEALS for the SECOND CIRCUIT
supplementing
Federal Rules of Appellate Procedure

Sec. 27. Motions:

(a) Form of Notice of Motion and Supporting Papers for Motions and Opposition Statements.

(1) Notice of Motion: The moving party shall submit the Notice of Motion in the format approved by the court with such changes as the chief judge may from time to time direct.

(2) Supporting Papers for Motions and Opposition Statements:

(a) Affidavits should contain factual information only. Affidavit containing legal argument will be treated as memoranda of law.

(b) Memoranda of law shall not exceed ten typewritten double-spaced 8½" x 11" pages except by permission of the court.

(c) Copy of the lower court opinion or agency decision shall be included as a separately identified exhibit by a moving party seeking substantive relief.

(d) Exhibits attached should be only those necessary for the determination of the motion.

(3) Non-compliance Sanctions: If the moving party has not complied with this rule, the motion may be dismissed by the clerk without prejudice to renew upon proper papers. If application is promptly made, the action of the clerk may be reviewed by a single judge. If the responding party fails to comply with this rule, the court may refuse to hear that party at oral argument. The court may impose costs and an appropriate fine against either party for failure to comply with this rule.

Consolidated Appeals Docket No. 80 - 6254 et al.
Docket No.

United States Court of Appeals
FOR THE SECOND CIRCUIT

THE MARSCHALK COMPANY, INC.,
Plaintiff-Appellee,
-v-
IRAN NATIONAL AIRLINES CORP. and THE GOVERNMENT OF IRAN,
Defendants-Appellants,
UNITED STATES OF AMERICA,
Intervenor-Appellant.
(and related cases)

NOTICE OF MOTION

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APPENDIX A

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Ministry of War
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National Iranian Gas Co.
Kangan Liquified Natural Gas Corp.
Iran National Airlines Corp.
Iranian Air Force
Iran Aircraft Industries
Industrial Development & Renovation Organization
Islamic Republic Air Force
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Military Industries Organization
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And All Other Defendants not Otherwise Represented By Counsel

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Bank Farhangian
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Industrial Credit Bank
Industrial & Mining Development Bank of Iran
International Bank of Iran
International Bank of Iran and Japan
Iran Arab Bank
Iranians' Bank
Irano British Bank
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Grough Towlidi Tehran
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Iran International Oil Co.
Iran Knitting Co.
Iran Textile Distribution Co. Ltd.
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Jundi Shapur University
Karun Agro Industries, Inc.
Karkhanejat Towlidi Tehran
Kashan Industries Corp.
Kashan Velvet & Rayon Mills, Ltd.
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Mazandaran Textile Co.
National Iranian Fisheries Co.
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79 Civ. 6035	79 Civ. 6485
79 Civ. 6115	79 Civ. 6488
79 Civ. 6116	79 Civ. 6489
79 Civ. 6117	79 Civ. 6525
79 Civ. 6195	79 Civ. 6644
79 Civ. 6196	79 Civ. 6693
79 Civ. 6279	79 Civ. 6831
79 Civ. 6362	80 Civ. 0098
79 Civ. 6376	80 Civ. 0560
79 Civ. 6440	80 Civ. 1099
79 Civ. 6461	80 Civ. 1744
79 Civ. 6083	80 Civ. 1920
79 Civ. 6084	80 Civ. 1520

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- General Petrochemicals Corp. v. Government and State of Iran, et al.
  79 Civ. 6709 (JMC)

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- Blount Brothers Corporation v. The Government of Iran, et al.
  79 Civ. 6486 (LWP)

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- Compaigne Francaise de Prospection Sismique v. National Iranian Oil Co.
  80 Civ. 1920 (ADS)

- Sedco International, S.A. v. National Iranian Oil Co.
  79 Civ. 6115 (WCC)

- Sediran Drilling Company v. National Iranian Oil Co.
  79 Civ. 6116 (RJW)

- Sediran Drilling Co. v. National Iranian Oil Co.
  79 Civ. 6117 (TPC)

- Williams Brothers International Corp. v. National Iranian Oil Co.
  79 Civ. 6195 (LPG)

- Williams Brothers International Corp. v. National Iranian Oil Co.
  79 Civ. 6196 (LPG)

- Williams Brothers International Corp. v. National Iranian Oil Co.
  80 Civ. 1099 (LPG)

Baker & McKenzie

- Sedco Inc. as assignee of Iran Marine Ind. Co. v. National Iranian Oil Co.
  79 Civ. 6279 (LPG)

- Otis Engineering Corp. v. National Iranian Oil Co.
  79 Civ. 6484 (RWS)

- Halliburton Ltd. v. National Iranian Oil Co.
  79 Civ. 6485 (RWS)

- Houston Contracting Co. v. National Iranian Oil Co.
  79 Civ. 6488 (GLG)

- Houston Contracting Co. v. National Iranian Oil Co.
  79 Civ. 6489 (MEL)

- IMCO Services (U.K.) Ltd. v. National Iranian Oil Co.
  79 Civ. 6525 (LPG)

- Irano-Reading & Bates S.S.K. v. National Iranian Oil Co.
  79 Civ. 6831 (VLB)

- Ingersoll-Rand Co. v. National Iranian Gas Co. & Bank Markazi Iran
  79 Civ. 6867 (RWS)

- Reading & Bates Corp. v. National Iranian Oil Co.
  79 Civ. 6035 (GLG)

- Enserch Service Co. of Iran v. National Iranian Oil Co.
  80 Civ. 0560 (WCC)

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- Caviar & Fine Food v. Panacaviar Corp., et al. v. National Iranian Fisheries and the State of Iran
  79 Civ. 6835 (WCC)

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- The First National Bank of Boston v. Kashan Velvet and Rayon Mills, Ltd., et al. 79 Civ. 6587 (TPG)

- The First National Bank of Boston v. Iranians' Bank, et al. 79 Civ. 6588 (VLB)

- The First National Bank of Boston v. Hammadan Glass Co., et al. 79 Civ. 6620 (CBM)

- The First National Bank of Boston v. National Petrochemical Company of Iran, et al. 79 Civ. 6412 (WCC)

- The First National Bank of Boston v. Industrial Mining and Development Bank of Iran, et al. 79 Civ. 6413 (CES)

- The First National Bank of Boston v. Bank Sakhteman, et al. 79 Civ. 6414 (CSH)

- The First National Bank of Boston v. Mazandaran Textile Company, et al. 79 Civ. 6415 (RWS)

- The First National Bank of Boston v. Iran National Airlines Corp., et al. 79 Civ. 6416 (CSH)

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- Trans World Airlines, Inc. v. The State of Iran, et al. 80 Civ. 1980 (EW)

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- Cabot International Capital Corporation v. Government of Iran, et al. 80 Civ. 0098 (GLG)

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- American International Group, Inc., et al. v. Islamic Republic of Iran, et al. 79 Civ. 6696 (GLG)

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- Northwestern National Bank v. Bank of Tehran, et al. 79 Civ. 6467 (HFW)

- William L. Pereira Associates v. Imperial Medical Center, et al. 80 Civ. 0512 (ADS)

- ITEK Corporation v. The Government of Iran, et al. 79 Civ. 6468 (CBM)

- Seattle-First National Bank v. Industrial Mining & Development Bank of Iran, et al. 79 Civ. 6497 (RLC)

- Seattle-First National Bank v. Bank Saderat, et al. 80 Civ. 0570 (CES)

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- United Virginia Bank v. Industrial Credit Bank of Iran, et al. 79 Civ. 6480 (RJW)

- GTE International, Incorported and GTE Iran, Incorporated v. Telecommunications Company, et al. 80 Civ. 0933 (EW)

- Air La Carte, Inc., v. Iran National Airlines Corporation, et al. 80 Civ. 1897 (RWS)

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- Chemical Bank v. Government of Iran, et al.
79 Civ. 6344 (HFW)

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- Mellon Bank, N.A. v. The State of Iran, et al.
79 Civ. 6470 (LWP)

- Mellon International Finance Corporation v. State or Iran, et al.
79 Civ. 6860 (CSH)

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- Morgan Guaranty Trust Co. v. National Petrochemical Co., et al.
79 Civ. 6312 (HFW)

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- First National Bank of Chicago and First Chicago International Banking Corp. v. Agricultural Development Bank of Iran, et al.
79 Civ. 6331 (TPG)

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- Girard Bank v. Bank Pars, et al.
79 Civ. 6440 (LBS)

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- Walter Kidde & Co., Inc. v. Iran National Airlines Corp. et al.
80 Civ. 1953 (LBS)

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- Santa Fe International Corporation, Santa Fe International Services, Inc., and Santa Fe Overseas, Inc. v. The National Iranian Oil Company, et al.
79 Civ. 6693 (GLG)

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- Hadley Shipping Co., Ltd. v. Government Trading Corp., et al.
80 Civ. 6840 (EW)

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- American Security Bank, N.A. and American Security Bank, International, Ltd. v. Iranians' Bank, et al.
79 Civ. 6434 (RJW)

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- Advanced Techniques Corp. and Inter-Act. Corp. v. Information Systems Iran Organization, et al.
80 Civ. 0031 (LWP)

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- Trustees of Columbia University in the City of New York v. The State of Iran, et al.
80 Civ. 0241 (LWP)

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- Atlantic Richfield Company, ARCO International Services, Inc. and ARCO Exploration, Inc. v. Lavan Petroleum Company 79 Civ. 6714 (KTD)

- Offshore International, S.A. v. Iran Pan American Oil Company, et al. 79 Civ. 6483 (HFW)

- Offshore International, S.A. v. National Iranian Oil Co. 80 Civ. 1744 (HFW)

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- F.S. Wylie as Trustee v. Master Shipping Agency and Iran International Shipping Lines

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- Republic National Bank of New York v. Bank of Tehran, et al. 79 Civ. 6371 (GLG)

- Republic National Bank of New York and Trade Development Bank v. National Iranian Gas Co., et al. 80 Civ. 1679 (VLB)

- Republic National Bank of New York v. Gicafuor, Inc., et al. 80 Civ. 1680 (VLB)

- Trade Development Bank v. Iranian Ministry of Energy, et al. 80 Civ. 1681 (VLB)

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- John Doe v. The Government of Iran, et al. 79 Civ. 6420 (WCC)

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- John Doe II v. The Government of Iran, et al.
  79 Civ. 6852 (WCC)

- Transportation Consultants International v. Iran National Airlines Corporation.
  79 Civ. 6508 (LPG)

- Sea-Land Service, Inc. v. The Government of Iran, et al.
  80 Civ. 1097 (CLB)

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- Fidelity Union Trust Company v. Development and Investment Bank of Iran
  80 Civ. 1432 (LBS)

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- Logos Development Corporation v. Information Systems Iran, et al.
  80 Civ. 0033 (WCC)

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- Chase Manhattan Bank, N.A. v. The State of Iran, et al.
  79 Civ. 6644 (TPG)

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Paskus, Gordon & Hyman
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Pester, Goldberg & Schiff
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Proskauer, Rose, Goetz and Mendelsohn
300 Park Avenue
New York, New York 10022
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Reavis & McGrath
345 Park Avenue
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Rogers & Wells
Pan Am Building
200 Park Avenue
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Rosenman, Colin, Freund, Lewis & Cohen
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Santora, Shenkman & Kushel
521 Fifth Avenue
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212/867-5050

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Satterlee & Stephens
277 Park Avenue
New York, New York 10017
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Schreiber, Klink, Schreiber & Lenhart, P.C.
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Seyfarth, Shaw, Fairweather & Geraldson
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Shearman & Sterling
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212/483-1000

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Simpson, Thacher & Bartlett
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280 Park Avenue
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Surrey & Morse
485 Madison Avenue
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Townley & Updike
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Weil, Gotshal & Manges
767 Fifth Avenue
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White & Case
14 Wall Street
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Winthrop, Stimson, Putnam & Roberts
40 Wall Street
New York, New York 10005
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